84-1600

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BASHEER HAMEED (f/k/a James Dixon York)
and ABDUL MAJID (f/k/a Anthony LaBorde),

Petitioners,

—against—

W. CLINTON JONES, Superintendent of Great Meadow Correctional Facility, and EUGENE LEFEVRE, Superintendent of Clinton Correctional Facility,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM M. KUNSTLER
MARK B. GOMBINER
RANDOLPH M. SCOTT-MCLAUGHLIN
Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

Attorneys for Petitioners

79pp

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. _____

BASHEER HAMEED (f/k/a James Dixon York) and ABDUL MAJID (f/k/a Anthony LaBorde),

Petitioners,

-against-

W. CLINTON JONES, Superintendent of Great Meadow Correctional Facility, and EUGENE LEFEVRE, Superintendent of Clinton Correctional Facility,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

QUESTION PRESENTED

Did the declaration of a mistrial because the court did not wish to embarrass a mentally ill juror deprive petitioners of their right to have their fate decided by a particular tribunal?

PARTIES

The parties to the Matter are Basheer Hameed, Abdul Majid, W. Clinton Jones, the Superintendent of Great Meadow Correctional Facility, and Eugene LeFevre, the Superintendent of Clinton Correctional Facility.

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JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Second Circuit was entered on December 10, 1984. A petition for rehearing and for rehearing en banc was denied by order entered February 7, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

New York Criminal Procedure Law §270.35 provides:

> Trial jury; discharge of juror; replacement by alternate juror.
>
> If at any time after the trial jury has been sworn and before the rendition of its verdict, a juror is unable to continue serving by reason of illness or other incapacity, or for any other reason is unavailable for continued service, or the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature, but not warranting the declaration of a mistrial, the court must discharge such juror. If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror

> whose name was first drawn and called, provided, however, that if the trial jury has begun its deliberations, the defendant must consent to such replacement. Such consent must be in writing and must be signed by the defendant in person in open court in the presence of the court. If no alternate juror is available, the court must declare a mistrial pursuant to subdivision three of section 280.10.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 750 F.2d 154 (2nd Cir. 1984). The opinion of the United States District Court for the Eastern District of New York appears at A-11 hereto. The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, is reported at 99 A.D. 2d 824, 472 N.Y.S. 2d 417 (1984). The opinion of Justice O'Brien appears at A-3 hereto.

STATEMENT OF THE CASE

On June 15, 1981, Basheer Hameed and Abdul Majid were indicted in the Supreme Court of New York, Queens County, for the

murder of police officer John Scarangella and the attempted murder of police officer Richard Rainey. The first trial of the indictment ended in August of 1982. The jury acquitted Mr. Hameed and Mr. Majid of attempted murder in the first degree, convicted them of attempted murder in the second degree, and deadlocked on the murder count.

The retrial of petitioners began in August of 1983. On October 6, 1983, the Hon. Cornelius J. O'Brien ordered a mistrial after one of the deliberating jurors was determined to be incompetent because of mental illness.

Following the discharge of the jury, petitioners filed a motion before the trial court to prohibit a third trial. The motion was filed on November 7, 1983 and denied by the trial court on November 21, 1983.

On December 1, 1983, petitioners applied to the Appellate Division of the Supreme Court of the State of New York, Second Department, for an order pursuant to Article 78 of the New York Civil Practice Law and Rules dismissing the indictment. The basis for the application was that a third retrial would subject the petitioners to double jeopardy because the mistrial was not the product of any manifest necessity. On February 27, 1984, the Appellate Division denied the application with a short opinion.

On March 29, 1984, the New York Court of Appeals, without written decision, denied petitioners' application for leave to appeal from the order of the Appellate Division.

On April 3, 1984, having exhausted all available state remedies, petitioners filed a writ of habeas corpus from the

United States District Court for the Eastern District of New York, Platt, J. The District Court granted petitioners' application for a stay of their retrial pending a decision on the merits of the petition. The petition was denied on April 25, 1984. A certificate of probable cause was then issued by the District Court.

Oral argument was held in the United States Court of Appeals for the Second Circuit on September 20, 1984. The decision of the Court of Appeals, affirming the ruling of the District Court, was entered on November 26, 1984. A petition for rehearing and for suggestion of rehearing en banc was timely filed and was denied on February 7, 1985.

STATEMENT OF FACTS

A. Background

Basheer Hameed and Abdul Majid have been twice tried for the murder of police officer John Scarangella. Their first trial lasted for over five months. The jury acquitted them of attempted murder in the first degree of Officer Scarengella's partner, Richard Rainey, convicted them of attempted murder in the second degree, and deadlocked on the murder charge.

The second trial of petitioners began in Queens County Supreme Court in August of 1983, more than two years after the April 16, 1981 shooting of Scarangella and Rainey. The presiding judge was the Honorable Cornelius J. O'Brien. Jury selection in the case took three weeks and involved the examination of hundreds of jurors. Numerous jurors were successfully challenged for cause

because of deep-seated feelings regarding the nature of the charged crime, the religion and politics of the defendants (both Mr. Hameed and Mr. Majid are Muslims and former members of the Black Panther Party), and prior knowledge of the case. Summations took place on September 28, and 29, 1983.

B. Jury Deliberations

The jury commenced deliberations on the afternoon of September 29th. At the request of defense counsel, the three remaining alternate jurors were retained. (The first alternate had already been substituted for a juror who had had a heart attack during the course of the trial.) The alternates were kept separate from the deliberating jury, but were sequestered and were present during all readbacks.

Deliberations continued on Friday, September 30th, and Saturday, October

1st, with many lengthy interruptions for readbacks of trial testimony. The jury did not deliberate on Sunday, October 2nd.

On Monday, October 3rd, deliberations resumed, with another readback occupying much of the morning. Before lunch time on October 3rd, the jury announced that it was deadlocked, but the court, noting sua sponte that the panel had not deliberated for any significant length of time, directed it to continue deliberations. No Allen charge was either requested or delivered.

Deliberations continued for the remainder of October 3rd, 4th and 5th. These days also featured numerous readbacks.

C. The Second Note

On October 6th, at approximately 3:15 p.m., the jury sent a second note to Justice O'Brien, which read: "We, the

jury, cannot reach a verdict. We have York, not guilty, eight; guilty, four. LaBorde, not guilty, eight; guilty, four. We are a hung jury. Sincerely, Mrs. Greer."

Defense counsel responded to this note by asking that the Judge deliver an Allen charge. Justice O'Brien gave the charge which concluded at 4:20 p.m. The instructions were a standard version of an Allen charge, requesting that the jury make every possible effort to reach a verdict if they could do so without violating their individual judgments and consciences.

Following the Allen charge, a side-bar was held. Counsel for Mr. Majid, Randolph Scott-McLaughlin, requested that "the Court follow the practice it followed last night, which is to keep them beyond the usual hour, in, perhaps, the hope that if they stay, by

eleven tonight, they won't have to come back tomorrow morning, and the Allen charge--."

The Court replied, "I intended to stay later on tonight."

D. A Juror Has A Problem

At approximately 7:00 p.m., all attorneys were called to an in camera conference. One of the jurors, a Ms. Doe, had made a request that she not have to eat with the rest of the jurors and that she be allowed to contact her psychiatrist. The Court also informed the parties that "Her husband has been contacted, and I believe that her husband has conveyed to Mr. Kenny [the Court Clerk] the information that Dr. Vivik has advised that she call him. . ."

A discussion was then held as to how to handle this situation. It was finally agreed that the Judge would speak to Ms. Doe's doctor while the rest of the jury

went to dinner. All parties consented to this arrangement.

The District Attorney requested that the judge "inquire of the jury themselves whether or not they wish to continue deliberations, whether they want to go to dinner." Defense counsel opposed this suggestion, noting that the Allen charge had just been given.

The request of the District Attorney was denied. The Court stated, "I was hoping to go beyond that, as you undoubtedly well know. If I'm sending them out to dinner, to go beyond, byond that. I'm not intending to go much beyond tonight."

E. An Incompetent Juror

The jury, sans Ms. Doe, was sent to dinner. About an hour-and-a-half later, the Judge convened another meeting. He informed counsel that he had spoken to Ms. Doe. "Miss Doe, beyond any doubt, is

in a state where she is absolutely unfit to continue." The Judge went on to relate that he had called Ms. Doe's doctor, Dr. Vivik, and that "He told me that Mrs. Doe had a psychotic episode a year ago, normally referred to, in his terms, as a nervous breakdown. I put her on the phone. She spoke in general terms to coin a phrase, pretty bad shape. I didn't know what she was talking about, except for a few words.

"She just indicated that it was the same as last year. I just couldn't understand her."

F. Mistrial Declaration

Justice O'Brien then declared a mistrial. He stated:

> When she got off the phone, I asked her to leave the room, and the doctor said that she was on the brink of a psychotic episode, and could not continue.
>
> Now, I contacted her husband. He is here. I have spoken to him, and, of course,

> we have a great concern, that is the press is going to get her name. I have made arrangements that she is to be taken to see the doctor at 9:30, and we are running beyond that.
>
> But I am going to call the doctor, and have her call him in a few minutes.
>
> I am going to discharge the jury.

G. Request for Implementation of C.P.L. §270.35

Immediately following this sua sponte declaration of a mistrial, Mark Gombiner, co-counsel for Mr. Hameed, declared, "Judge, we would request that pursuant to Criminal Procedure Law 270.35, that Mrs. Doe be replaced with one of the alternate jurors." In the discussion that followed, defense counsel pointed out, inter alia, that (1) C.P.L. §270.35 is a mandatory statute which says that the court "must" substitute an alternate when requested by the defendant; (2) that there was a strong

possibility that Ms. Doe's condition may have been the obstacle to the jury reaching a decision and that her mental state would almost certainly have precluded meaningful deliberations after the giving of the Allen charge; (3) that defendants had a strong constitutional and practical interest in obtaining a verdict from the sitting jury; (4) that there would be no logic to retaining alternates if they were not to be used; and (5) that case law demanded the substitution of an alternate. Counsel stated that "For all of those reasons, we would object in the most vociferous or strenuous words to the dismissal of the jury at this time."

H. The Court's Response

Justice O'Brien refused to invoke C.P.L. §270.35. He stated that "I was within a matter of a couple of hours discharging the jury, in any event,

before this unfortunate incident." He went on to say that "I am concerned that if I continue, and I was not going to continue past at the latest, eleven o'clock tonight, after giving that Allen charge. If we continue, we may have problems with other jurors."

Justice O'Brien then gave, in full, his reasons for not using C.P.L. §270.35.

> I think, quite frankly, I will speak very bluntly, that if I were to substitute an alternate at this stage, it would be absolutely absurd, really.
>
> And I am not going to do it.
>
> My main concern right now is this:
>
> I have spoken to Miss Nick's husband. I don't want the press to get the name of Miss Nick.
>
> Now, if I substitute an alternate, I would have to release Miss Nick. This is just an ancillary reason for my not going along.
>
> Further, it would be out very quickly that Miss Nick suffered this episode.

All right, but it would happen.

There is no way I can guard against it.

If I substitute an alternate right now, Miss Nick's name would be in the paper tomorrow.

Now, what I'm going to do is I'm going to very briefly go outside here and I am going to discharge the jury. I am going to direct that they not speak to the press when they're gone.

I'm going to now direct my words to the press, to the audience.

I'm going to tell the press the reason why I am directing the jury not to speak to the press, is that one of the jurors has had--I don't want to say a breakdown or something, but she is on the verge, she is within moments of it.

But I don't want to say that because I don't want people calling and trying to find out who the problem is with.

The next thing is, Miss Nick, and I spoke to her husband, and he doesn't want this to happen. Nobody in his right mind would want this to happen.

Miss Nick will have irreparable damage to her

> mental health, and that's my main concern right now. That's my main concern.
>
> Not my only concern. I have a hundred concerns. That's my main concern, my overriding concern.

Counsel for Mr. Hameed and Mr. Majid once again expressed their sympathy for Ms. Doe, but reaffirmed that "Ms. Doe's concerns are very important, but the defendants' concerns in getting a verdict is very important."

I. "A Matter Of My Discretion"

Only after all of the above had transpired, did the court begin to talk about a hung jury:

> Mr. Gombiner, I wouldn't do this if I thought, if I didn't think that I would be wasting time anyway, because I am convinced there is going to be no verdict tonight, and I would probably have to hold the jury for at least another couple of days.
>
> I'm not going to do it, because in this atmosphere, to me, it is absolutely improper.

> I am going to discharge the jury.

Justice O'Brien went on to defend his choice as "a matter of my discretion."

J. Refusal to Poll the Jury

Faced with this unyielding position, counsel asked that the jury at least be questioned to see if there was any possibility of a verdict.

The Court responded:

> What about Ms. Doe? What am I going to do with Miss Doe now in order to save her embarrassment?
>
> Just to see if I can have her just sitting outside quietly and sit there while I discharge the jury, how is she going to participate?

Justice O'Brien then declined to follow defendants' suggestion for a poll or to take any other action.

K. Further Debate

Counsel continued to press for an alternative to a mistrial, but to no avail. The District Attorney encouraged

the court to adhere to its mistrial declaration, averring that "I think the Court is acting within its proper discretion."

L. The Trial Ends

At approximately 11:00 p.m., Justice O'Brien brought the jury into open court. He had first informed counsel, "I have no other choice, in my view, but to do what I am going to do." Counsel for Mr. Majid, in open court, repeated his plea that a mistrial not be declared. The application was, of course, denied. The jury was then discharged.

M. Post-Trial Affidavits

Four jurors submitted affidavits to defendants after the conclusion of the trial. The four jurors said they were "certain that if we had been given more time we would have been able to reach an unanimous verdict acquitting both

defendants." Ms. Doe was identified as one of the four pro-conviction jurors.

REASONS FOR GRANTING THE WRIT

The Second Circuit opinion misapplies settled law which requires a showing of manifest necessity before a mistrial may be declared over defendants' objection. The court below relied on the conceded discretionary power of a trial judge to order a mistrial when he concludes that a jury is hopelessly deadlocked. Arizona v. Washington, 434 U.S. 495 (1978). In so holding, the court ignored a record which demonstrates that it was Ms. Doe's emotional collapse and the attendant desire of the trial court to spare her "embarrassment" which triggered the mistrial. Concern for a juror's feelings, no matter how well intended, will not displace the valued right of the defendants to have their fate decided by a particular tribunal.

The Second Circuit correctly notes that "It is true that the trial judge said that Ms. Doe's mental health was his 'main concern' and that he declined to inquire of the other jurors whether or not they felt there was a possibility of a verdict apparently out of concern for embarrassment to Ms. Doe." (A-41). The panel, however, went on to cite "the increasingly apparent strain and tension placed on the sequestered jury by the lengthy deliberations, the highly charged atmosphere of the case, and the remote likelihood that even a jury untroubled by Ms. Doe's illness would have reached a verdict by the end of the evening." The Circuit court concluded that "When, during the evening, Justice O'Brien confronted Ms. Doe's psychiatric problem and with it his option to substitute an alternate at the eleventh hour of deliberations, we think that he

acted soundly in throwing in the judicial towel. In short, he was acting not by inclination but with judgment." (A-43).

The foregoing syllogism would be persuasive if its premises were accurate. They are not. At 4:20 p.m., Justice O'Brien delivered an Allen charge to the jury. Sometime prior to 7:00 p.m., he learned that Ms. Doe was exhibiting signs of mental instability.[1] Thus, late in the afternoon the trial judge believed that an Allen charge (the first given) might produce a verdict. Within hours he discovered that one of the jurors was probably incapable of participation in the deliberations. Upon confirming the incapacity ("I didn't know what she was

---

[1]The post-trial affidavit of Emiliene Pascouet states that Ms. Doe began crying shortly after 4:30 p.m. and that she was removed from the jury room at 5:00 p.m.

talking about, except for a few words."), he ordered a mistrial despite the request of defendants to substitute an available alternate.[2]

This record cannot be reconciled with an exercise of informed discretion. If the judge believed that a jury deadlocked at 8-4 for acquittal might reach a decision with the help of an Allen charge, the discovery that one of its members (apparently one of the 4 dissenters) was incompetent could only lead to the conclusion that her replacement would make a verdict more likely. Surely, the deliberative process was not abetted by the inclusion of a juror who was on the brink of a psychotic episode.

---

[2]New York Criminal Procedure Law §270.35 states that once deliberations have commenced, the sitting juror who

(Footnote Continued)

The mistrial order violated the mandate of Arizona v. Washington requiring a "high degree" of necessity before a mistrial is appropriate. Nor was it compatible with the admonition of Justice Story in United States v. Perez, 9 Wheat. 579, 580. "To be sure, the power [to declare a mistrial] ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . ." There is nothing plain obvious or highly necessary about declaring a mistrial over defendants' objections because the trial court has learned that one of the jurors is mentally unfit and does not want to embarrass her.

(Footnote Continued)
becomes incompetent "must" be replaced by an alternate juror if the defendant consents.

If the jury did not need to be discharged at 4:20 when the court gave the Allen charge, it did not need to be discharged when the court learned that one of the jurors was having a nervous breakdown. The mistrial order stripped petitioners of their right to have their fate decided by a particular tribunal. United States v. Jorn, 400 U.S. 470 (1970); Illinois v. Somerville, 410 U.S. 458 (1972); Wade v. Hunter, 336 U.S. 684 (1948). This principle cannot be bartered for concerns over a juror's feelings.

"[I]f the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate." Arizona v. Washington at 511. The trial problem which occasioned the mistrial was Ms. Doe's breakdown. Justice O'Brien was

explicit in that regard. The reviewing courts, however, in defiance of this Court's holding in Arizona, has treated the case as a question of a deadlocked jury. That analysis is wrong and derogates petitioners' fifth amendment rights.

The decision below is a dangerous and unwarranted extension of Arizona v. Washington. "Discretion" should not become the vehicle for a sub silentio attack on Perez and its progeny.

CONCLUSION

For the foregoing reasons, a petition for certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

WILLIAM M. KUNSTLER
MARK B. GOMBINER
RANDOLPH M. SCOTT-McLAUGHLIN
Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003
(212) 674-3303

Attorneys for Petitioners

Dated: New York, NY
April 7, 1985

APPENDIX

SUPREME COURT-STATE OF NEW YORK
CRIMINAL TERM PART L-5 QUEENS COUNTY
25-10 Court Square, Long Island City,NY

P R E S E N T:
HON. CORNELIUS J. O'BRIEN
Acting Justice

THE PEOPLE OF THE STATE OF NEW YORK

-against-

BASHEER HAMEED (AKA JAMES YORK) and ABDUL MAJID (AKA ANTHONY LaBORDE)

Defendants.

Ind. No.1493/81

Motion dismiss indictment

Submitted 11/7/83

Argued _____

Hearing _____

The following papers numbered 1 to 4 submitted in this motion

WILLIAM M. KUNSTLER, ESQ. (Hameed), RANDOLPH SCOTT-McLAUGHLIN, ESQ. (Majid)
For the Motion

JOHN J. SANTUCCI, D.A., (By: DEAN MANIS, A.D.A.)
Opposed

	Papers Numbered
Notice of Motion and Affidavits/ Affirmations Annexed	1-2
Answering and Reply Affidavits/ Affirmations	3

Exhibits _____ ___

Minutes _____ ___

Other Defendants' Memorandum of Law 4___

Upon the foregoing papers, and in the opinion of the court herein, the motion by the defendants for dismissal of the indictment pursuant to CPL 210.10(1)(e) and on the further ground, under CPL 210.40, that such dismissal is warranted by the furtherance of justice, is hereby denied in its entirety. (See the annexed memorandum dated November 21, 1983.)

GRANTED: JOHN J. DURANTE

Date: November 21, 1983

CORNELUS J. O'BRIEN, J.S.C.

MEMORANDUM

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART L-5

THE PEOPLE OF THE STATE OF NEW YORK

-against-

BASHEER HAMEED (AKA JAMES YORK) and ABDUL MAJID (AKA ANTHONY LaBORDE)

Defendant.

By CORNELIUS J. O'BRIEN, J.

Dated:11/21/83

Ind. #1493/81

This is a motion by the defendants for an order dismissing the indictment pursuant to CPL Section 210.20, subdivision (1)(e) on the ground that to retry them would subject them to double jeopardy under the provisions of CPL section 40.20, subdivision (1)(a). It is specifically stated in subdivision 2 of section 310.60 that "when the jury is so discharged, the defendant or defendants may be retried upon the indictment."

Further, there are no grounds for the dismissal of this indictment in the furtherance of justice since the defendants have not alleged the existence of any "compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant[s] upon such indictment or count would constitute or result in injustice." (CPL 210.40[1]).

Short form order signed herewith.

The clerk of the court is directed to mail a copy of this decision and order to the attorneys for the defendants and to the District Attorney.

Cornelius J. O'Brien, J.S.C.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 27,1984.

HON. VITO J. TITONE, Justice Presiding,
HON. GUY J. MANGANO,
HON. WILLIAM C. THOMPSON,
HON. FRANK D. O'CONNOR
Associate Justices

Basheer Hameed, et al.,
Petitioners,
v.
Seymour Rotker, Acting Justice of the Supreme Court of the State of New York, 11th Judicial District,
Respondent.

A proceeding having been instituted in this court pursuant to CPLR article by the petition of Basheer Hameed, et al, affirmed by William M. Kunstler, one of the attorneys for the said petitioners, on December 1, 1983, (1) in effect, to prohibit respondent from commencing a second retrial of petitioners under Indictment No. 1493/81, and (2) for dismissal of the said indictment; and the

respondent having submitted an affirmation in opposition thereto;

Now, upon the said petition, the exhibits annexed thereto; and the petitioner's memorandum of law; and respondent's said affirmation, affirmed by Dean Manis on December 6, 1983; and the proceeding having been submitted to William M. Kunstler, Esq., of counsel for the petitioners and submitted by Dean Manis, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the proceeding is hereby dismissed, without costs or disbursements.

Enter:
IRVING N. SELKIN

Clerk of the Appellate Division

February 27, 1984

VITO J. TITONE, J.P.
GUY J. MANGANO
WILLIAM C. THOMPSON
FRANK D.O'CONNOR, JJ.

January 16, 1984

___AD2d___

Mot. No. 9503
1300 E

Basheer Hameed, et al., Petitioners, v. Seymour Rotker, Acting Justice of the Supreme Court of the State of New York, 11th Judicial District, Respondent.

William M. Kunstler and Mark B. Gombiner, New York, N.Y., for petitioner Hameed and Randolph Scott-McLaughlin and C. Vernon Mason, New York, N.Y., for petitioner Majid (one brief filed).

John J. Santucci, District Attorney, Kew Gardens, N.Y. (Dean Manis of counsel), for respondent.

Proceeding pursuant to CPLR article 78(1) in effect, to prohibit respondent from commencing a second retrial of petitioners under Indictment No. 1493/81, and (2) for dismissal of the said indictment.

Proceeding dismissed, without costs or disbursements.

Notwithstanding the fact that the trial court had delivered an Allen charge (Allen v. United States, 164 U.S. 492) three hours prior to its declaration of a mistrial, it was not bound to substitute an available alternate, pursuant to CPL 270.35, when one juror was unable to continue deliberations. Because the jury had been deliberating for seven days and had twice declared itself deadlocked (first on the fourth day of deliberations and again on the seventh day of deliberations), the court could have concluded that agreement on a verdict was unlikely within a reasonable time and thus properly declared a mistrial in accordance with CPL 310.60. The Trial Judge was "best situated intelligently to make such a decision" (Gori v. United States, 367 U.S. 364, 368) and, under all the relevant facts and circumstances, we find that he exercised his discretion

properly and that retrial will not deprive petitioners of any constitutional right (Gori v. United States, 367 U.S. 364, 368, supra; Arizona v. Washington, 434 U.S. 497, 510; Hall v. Potoker, 49 NY 2d 501, 505; Matter of Respeto v. McNab, 90 AD 2d 308, 311, aff'd 60 NY 2d 739; People v. Rial, 25 AD 2d 28, 31).

Moreover, it is well settled that the failure of successive juries to reach a unanimous verdict does not interdict a further retrial (Arizona v. Washington, supra; United States v. Chin, 622 F.2d 1090, 1092, cert. den. 450 U.S. 923; United States v. Mespoulede, 597 F.2d 329; People v. Kirby, 112 Misc. 2d 906, 907-909, approved on this point, rev'd on other grounds, 92 AD 2d 848, mot. for lv. to app. granted 60 NY 2d 706). To the extent that petitioners seek dismissal of the indictment in the interest of justice, we note that such relief is not

obtainable in this collateral proceeding. (See Matter of Legal Aid Soc. of Sullivan County v. Scheinman, 53 NY 2d 12; Matter of State of New York v. King, 36 NY 2d 59; Matter of Masin v. County Ct. of Schuyler County, 97 A.D. 2d 643) and, in any event, would not be warranted on this record. (People v. Kirby, supra).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

BASHEER HAMEED (f/k/a James Dixon York) and ABDUL MAJID (f/k/a Anthony LaBorde),

Petitioners,

-against-

W. CLINTON JONES, Superintendent of Great Meadow Correctional Facility and EUGENE LEFEVRE, Superintendent of Clinton Correctional Facility,

Respondents.

CV 84-1329

MEMORANDUM AND ORDER

4/25/84

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PLATT, D.J.

Petitioners, Basheer Hameed (formerly known as James Dixon York) and Abdul Majid (formerly known as Anthony LaBorde), make the instant application for a writ of habeas corpus under 28 U.S.C. §2254 (1976) on the grounds that their retrial in State Court on charges of second-degree murder would constitute double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The basis of the

application arises from petitioners' second trial on these charges, which ended when the deadlocked jury was discharged on the sixth day of deliberations. It is the circumstances surrounding the jury discharge which we are asked to review in this proceeding.

THE FACTS

The petitioners were originally tried in 1982 in Supreme Court, Queens County, on charges of murder in the second degree and assult in the first degree. They were convicted of attempted murder in the second degree, acquitted of attempted murder in the first degree and assault in the first degree, but no verdict could be reached on the second degree murder charge and the jury was discharged on that charge.

The People of the State of New York moved for a retrial of the second degree murder charge, which petitioners opposed,

on the grounds that such a trial would subject them to double jeopardy. This opposition culminated in a habeas corpus petition in this Court, which was denied by the undersigned on July 7, 1983. Retrial of the petitioners began in July, 1983, and proceeded until Thursday, September 29, 1983, when the jury first retired to deliberate. Three alternate jurors were separated from the regular jury at this point, but were not dismissed.

The jury deliberated for two hours on September 29, 1983, and all day September 30, and October 1st, interrupting their deliberations each day for lengthy read-backs of portions of the trial testimony. On October 3d, the jury announced before lunch that they were deadlocked. The Court directed them to continue their deliberations, which they did, deliberating for the rest of that

day, and all day October 4th and 5th, again interrupting deliberations for read-backs. On October 6th the jury deliberated until 3:15 p.m., when they again notified Mr. Justice Cornelius O'Brien that they were deadlocked, this time adding that they stood eight (8) to four (4) for acquittal of both defendants. At the request of petitioners an Allen charge was given and the jury was remanded for further deliberations.

Shortly before the scheduled dinner recess on October 6th, it became apparent to Mr. Justice O'Brien and the trial attorneys that juror number 12, Ms. Jean Nicks, was experiencing severe emotional problems. While making it clear that he was not inclined to keep the jury past that evening in any event, Mr. Justice O'Brien decided with the consent of counsel to let Ms. Nicks speak to her

psychiatrist over the phone while the other jurors went to dinner. The phone call was to be monitored by a Court official to ensure that the deliberations were not discussed.

While the jury was at dinner, Ms. Nicks spoke to her psychiatrist. The psychiatrist then spoke to Mr. Justice O'Brien, who learned that Ms. Nicks had had a nervous breakdown a year before, and, in the psychiatrist's opinion, was on the brink of another psychotic episode.

Mr. Justice O'Brien reconvened the attorneys for petitioners and the People at 9:30 p.m. and, after relating his conversation with Ms. Nicks' psychiatrist to them, informed them that he was going to discharge the jury.*

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*As noted above, Mr. Justice O'Brien
(Footnote Continued)

Both petitioners, through their lawyers, requested that Mr. Justice O'Brien not discharge the jury, but rather replace Ms. Nicks with one of the alternates, as provided for in N.Y. C.P.L. §270.35 (McKinney's 1982).

After a lengthy colloquy during which he outlined his reasons for so doing, Mr. Justice O'Brien discharged the jury. His reasons were: first, the fact that discharging only Ms. Nicks would bring her predicament to the attention of the press, (which was covering the trial closely) and the resulting publicity

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(Footnote Continued)
had made it clear to the attorneys, before the scope of Ms. Nicks' difficulties was known, that he was going to discharge the jury no later than 11:00 p.m. that evening. When the decision to let Ms. Nicks go became necessary, there was only one hour and a half left that evening for an alternate to be sworn and allowed to deliberate, a situation which Mr. Justice O'Brien in the exercise of his judgment felt would not be productive.

might do her considerable harm; second, his conviction, arrived at that afternoon that the jury was truly deadlocked; third, that seven days of deliberation was enough time to have come to a verdict, and that there was no prospect of a verdict within a reasonable time; fourth, that any alternate brought in at this stage in the deliberations would require time to catch up on the prior deliberations; and fifth, that other jurors were evincing signs of strain, making delays attendant upon the substitution of an alternate unacceptable. While Mr. Justice O'Brien said that Ms. Nicks' mental health was his primary concern, it is clear from the record that there were other pressing considerations which were fully explored and examined.

After the jury was discharged, the petitioners moved to dismiss the

second-degree murder charge as barred by double jeopardy, a motion denied by Mr. Justice O'Brien on November 21, 1983. Petitioners then commenced Article 78 proceedings in the Appellate Division, attempting to prevent the second retrial, again on double jeopardy grounds. This proceeding was dismissed on January 16, 1984, with the finding that Mr. Justice O'Brien had exercised his discretion properly, given the length of the deliberations and the two "deadlock" announcements and that therefore retrial of the defendants was permissible under State law and would not involve double jeopardy under the Fifth Amendment. Leave to appeal the Article 78 dismissal was denied by the Court of Appeals on March 29, 1984, and this application followed. On April 6, 1984, we granted petitioners' motion for a stay of the second retrial pending our decision on

this application. For the reasons outlined below, we now deny the application for a writ of habeas corpus.

DISCUSSION

Petitioners' arguments in this proceeding are that Mr. Justice O'Brien's decision to discharge the jury was based on improper motives, that he failed to correctly determine whether there was any chance of a fair verdict and that this improper discharge would make any retrial of the petitioners a violation of the Fifth Amendment's prohibition against double jeopardy.

The Fifth Amendment does not prevent retrial when the prior discharge of a jury is "a manifest necessity. . ., or the ends of p ' ic justice would otherwise be defeated." United States v. Perez, 9 Wheat. 579 (1824). The discharge of a jury based upon its inability to reach a verdict is "the

classic basis for a proper mistrial." Arizona v. Washington, 434 U.S. 497, 509 (1978). See also, Downum v. United States, 372 U.S. 734 (1963); Keerl v. Montana, 213 U.S. 135, 138 (1909); Dreyer v. Illinois, 187 U.S. 711, 86 (1902); Logan v. United States, 144 U.S. 263, 298 (1892); United States v. Perez, supra. The issue which the trial judge must address in a "deadlocked jury" case is whether further deliberations would have produced a fair verdict. If they would not, then a mistrial followed by a retrial does not violate the Fifth Amendment. The trial judge's determination on that issue must be "accorded great deference by a reviewing court." Arizona v. Washington, supra at 510. Logan v. United States, supra at 298. That deference is only due, of course, when there exists evidence on the record that the trial judge based his

decision to discharge the jury on the chances of agreement, and not on some other, unrelated factor. Arizona v. Washington, supra at 510 n. 28.

At the outset, we note that the issue we are asked to address in this application, the propriety of Mr. Justice O'Brien's discharge of the jury, was the subject of the Article 78 proceedings in State Court, proceedings which ended with a finding that there was no abuse of discretion in Mr. Justice O'Brien's act. Under 28 U.S.C. §2254(d) which governs habeas corpus applications such as this, such finding must be presumed to be correct for purposes of the present application, regardless of the fact that it was made by a State appellate level Court, Sumner v. Mata, 449 U.S. 539 (1981), unless, with some exceptions not relevant here, we find after a review of the record that the factual determination

is not fairly supported by the record. 28 U.S.C. §2254(d)(8). This is so even though a finding of a proper exercise of discretion under State law is not in a strict sense a finding of "fact." Under N.Y. C.P.L. §310.60 (McKinney's 1982) the discretion exercised by Mr. Justice O'Brien was in concluding that the jury had deliberated for an extensive period of time without agreeing on a verdict and that such agreement was unlikely within a reasonable time. The Appellate Division's conclusion that Mr. Justice O'Brien had not abused his discretion was thus, in effect, a finding that the elements required by §310.60 were present. While such a finding is not, of course, immune from review in this proceeding, we must presume it correct if fairly supported by the record. Marshall v. Lonberger, U.S. 103 S.Ct. 843 (1983); Sumner v. Mata, supra.

The record evinces ample evidence to support the finding of the Appellate Division. The jury had deliberated for seven (7) days* and twice had announced their inability to come to a verdict. The trial judge, who could gauge the mood of the jury, and evaluate what each note indicated about the progress of deliberations was in the best position to determine the chances of agreement. From the colloquy of October 6, 1983, it is clear that Mr. Justice O'Brien carefully considered these signals and their implications and he concluded that the jury was deadlocked. On this record, we cannot disagree with the Appellate

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*At oral argument, counsel for petitioners made much of the fact that the deliberations were often interrupted by lengthy read-backs of trial testimony. While these interruptions would prevent discussion of the case between jurors, they would not prevent the mental deliberations of each individual juror.

Division's finding that Mr. Justice O'Brien properly concluded that after extensive deliberations a verdict was unattainable within a reasonable time. Given this actual finding by the State Court, amply supported by the record, we are compelled to find that the discharge of the jury by Mr. Justice O'Brien was a manifest necessity and that therefore a second retrial of petitioners on second-degree murder charges would not subject them to double jeopardy.*

Petitioners' application for a writ of habeas corpus must therefore be, and hereby is, denied. The stay of

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*We are of course confronted only with the constitutional (Fifth Amendment) question and are not directly concerned with the substitution of an alternate question which in its purest form is a question of the weight and/or interpretation of the relevant State statutes, except only as such question may bear on the trial judges' proper exercise of his discretion.

petitioners' second retrial in State Supreme Court issued April 6, 1984 will be continued pending an expeditious appeal of this decision.

SO ORDERED.

Thomas C. Platt

U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 138 — August Term, 1984

(Argued: Sept. 20, 1984 Decided: Nov. 26, 1984)

Docket No. 84-2150

BASHEER HAMEED (f/k/a James Dixon York) and ABDUL MAJID (f/k/a Anthony LaBorde),

Appellants,

v.

W. CLINTON JONES, Superintendent of Great Meadows Correctional Facility, and EUGENE LEFEVRE, Superintendent of Clinton Correctional Facility,

Appellees.

Before:

LUMBARD, OAKES, and PRATT, *Circuit Judges.*

Where juror has psychiatric episode after several days of jurors' deliberations and two notes indicate inability to reach a verdict, was there a "manifest necessity" for declaring a mistrial, even though alternates were available and a statute, N.Y. Crim. Prac. Law § 270.35, stated that an alternate "must" be seated with defendants' consent? The determination of the United States District Court for the Eastern District of New York, Thomas C.

Platt, *Judge*, that there was such a manifest necessity and hence no double jeopardy on a retrial is affirmed.

William M. Kunstler, New York, NY (Mark B. Gombiner, Randolph M. Scott Mclaughlin, C. Vernon Mason, New York, NY, of counsel), *for Appellants.*

Ray F. Cerreta, Assistant District Attorney, Queens County (John J. Santucci, District Attorney, Queens County, of counsel), *for Appellees.*

OAKES, *Circuit Judge:*

This appeal from the district court's denial of appellants' habeas corpus petition presents the familiar question whether a state trial court's declaration of mistrial was prompted by a "manifest necessity" sufficient to render a retrial constitutionally permissible. In this case, however, the familiar is framed in an unfamiliar context. In appellants' criminal trial, after the case had gone to the jury and the jury had received an *Allen* charge, one of the jurors suffered a psychiatric episode that rendered her unfit for further deliberations. When this occurred, the appellants requested that the trial judge substitute an available alternate juror, pursuant to a state statutory provision suggesting that the court *must* substitute such an alternate. The court refused appellants' request and instead declared a mistrial.

Appellants then brought an Article 78 proceeding[1] in the Appellate Division of the Supreme Court of New

[1] *See N.Y. Civ. Prac. Law* §§ 7801-7806 (McKinney 1981).

York, Second Department, seeking a dismissal of their indictments. When that action proved unsuccessful, appellants brought this petition under 28 U.S.C. § 2254 (1982) for a writ of habeas corpus in the United States District Court for the Eastern District of New York. The district court, Judge Thomas C. Platt, found that a "manifest necessity" [2] to declare a mistrial was apparent under the circumstances recounted below, finding hence that the United States Constitution, through the double jeopardy clause of the Fifth Amendment, as incorporated in the Fourteenth Amendment, poses no bar to a retrial of appellants. We affirm.

In 1982, Basheer Hameed, formerly James Dixon York, and Abdul Majid, formerly Anthony LaBorde, were tried by a jury in the Supreme Court of New York, Queens County, on charges of attempted murder in the second degree, in violation of N.Y. Penal Law §§ 110.00, 125.25 (McKinney 1975), attempted murder in the first degree, in violation of N.Y. Penal Law §§ 110.00, 125.27, assault in the first degree, in violation of N.Y. Penal Law § 120.10, and murder in the second degree, in violation of N.Y. Penal Law § 125.25. Both men were convicted of attempted murder in the second degree, but acquitted of attempted murder in the first degree and assault in the first degree. The jury in that trial, however, could not reach a verdict on the charge of murder in the second degree. It is on the retrial of that charge before Justice Cornelius O'Brien that the events set forth below took place.

After a lengthy jury selection process and a trial lasting several weeks, the jury retired to deliberate on September 29, 1983, with three alternates separated and

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[2] *See United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

sequestered (except for transcript readbacks) but not dismissed. Deliberations continued, punctuated by numerous readbacks, on September 30 and October 1, but not on Sunday, October 2. Before lunch on October 3, the jury announced that it was deadlocked, but the court directed it to continue deliberations. Deliberations took place on October 3, October 4, and October 5, and were again punctuated by numerous readbacks. On October 6, the sixth day of deliberations, at approximately 3:15 p.m., the jury sent a second note to Justice O'Brien, which read, "We, the jury, cannot reach a verdict. We have York, not guilty, eight; guilty, four. LaBorde, not guilty, eight; guilty, four. We are a hung jury. Sincerely, Mrs. Greer."

Defense counsel responded to this note by requesting that the judge deliver an *Allen* charge.[3] The judge granted the request, delivering a standard version of an *Allen* charge that concluded at 4:20 p.m. that afternoon. Following the *Allen* charge, counsel for Majid at side bar requested that "the Court follow the practice it followed last night, which is to keep them beyond the usual hour, in, perhaps, the hope that [if] they stay, by eleven tonight, they won't have to come back tomorrow morning." The judge replied, "I intended to stay later on tonight."

At about 7:00 p.m., all attorneys were called to a conference in chambers. A juror, "Ms. Jane Doe," had requested that she not have to eat with the rest of the jurors and that she be allowed to contact her psychiatrist. The court also informed the parties that "[h]er husband has been contacted, and I believe that her husband has conveyed to Mr. Kenny [the court clerk] the information that Dr. Vivik has advised that she call him." In the

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[3] *See Allen* v. *United States*, 164 U.S. 492 (1896).

discussion that followed, Hameed's counsel suggested that the court substitute an alternate juror for Ms. Doe, pursuant to *People* v. *Ryan*,[4] but the court cautioned:

> You have to remember that we have had the jury out for all these days, since last Thursday. The jury has been hung for most of that time, until today. There is no guarantee whatsoever that if an alternate replaces Miss [Doe] there is going to be any change.
>
> What I would like to do, and I think it's more proper, is to have Miss [Doe] speak to the doctor to determine whether or not the doctor says that she can continue.

After the judge indicated his belief that "other jurors" were "having difficulties also," the prosecutor suggested that the court inquire of the jurors whether they wanted to go to dinner (and therefore to continue deliberations) and that if all agreed there was no point to it, everyone's problems would be solved. The judge rejected the suggestion, adding that he had "hop[ed] to go beyond" the mere three hours of deliberation that had occurred following the *Allen* charge but that he was "not intending to go much beyond tonight." It was then agreed by all concerned that, given certain precautions, the doctor should speak to Ms. Doe while the rest of the jurors ate.

After a recess, following instructions to the other jurors not to deliberate during dinner, the judge said in a chamber conference, "I spoke to Miss [Doe]. Miss [Doe], beyond any doubt, is in a state where she is absolutely unfit to continue." He recounted his telephone conversation with her doctor, who advised him that Ms.

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[4] *People* v. *Ryan* 19 N.Y. 2d 100, 278 N.Y.S. 2d 199, 224 N.E. 2d 710 (1966).

Doe had suffered a psychotic episode, "a nervous breakdown," the year before. The judge informed the parties that he had then put Ms. Doe on the telephone to her doctor, and evaluated that conversation as follows:

> She spoke in general terms to coin a phrase, pretty bad shape. I didn't know what she was talking about, except for a few words.
>
> She just indicated that it was the same as last year. I just couldn't understand her.
>
> When she got off the phone, I asked her to leave the room, and the doctor said that she was on the brink of a psychotic episode, and could not continue.
>
> Now, I contacted her husband. He is here. I have spoken to him, and, of course, we have a great concern, that is the press is going to get her name. I have made arrangements that she is to be taken to see the doctor at 9:30, and we are running beyond that.
>
> But I am going to call the doctor, and have her call him in a few minutes.
>
> I am going to discharge the jury.

At this point defense counsel requested, pursuant to N.Y. Crim. Proc. Law § 270.35 (McKinney 1982), that she be replaced with an alternate.[5] Counsel argued vigor-

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[5] N.Y. Crim. Proc. Law § 270.35 provides:

> If at any time after the trial jury has been sworn and before the rendition of its verdict, a juror is unable to continue serving by reason of illness or other incapacity, or for any other reason is unavailable for continued service, or the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature but not warranting the declaration of a mistrial the court must discharge such juror. If an alternate juror or jurors are available

[Footnote continued on following page]

ously and at some length that the rule of substitution in § 270.35 was mandatory,[6] that the defendants had a real interest in not being subject to yet another trial, and that there had been only two or so hours of deliberation after the *Allen* charge. The court's response reflects an amalgam of concerns and considerations:

> I was within a matter of a couple of hours of discharging the jury, in any event, before this unfortunate incident.
>
> It came on with extreme suddenness.
>
> What occurred is that I believe it was Saturday, she became a little overwrought. But that's common.
>
> I paid very little attention to it.
>
> If you recall, Miss McCaffrey, at one point, was also crying and probably other jurors.
>
> As always happens, that becomes emotional.
>
> I had inquired discreetly a couple of times how these people were doing, whether they were showing signs of emotion. I wanted to be sure that everything was all right, because the deliberations were

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[Footnote continued from previous page]

for service, the court must order that the discharged juror be replaced by the alternate juror whose name was first drawn and called, provided, however, that if the trial jury has begun its deliberations, the defendant must consent to such replacement. Such consent must be in writing and must be signed by the defendant in person in open court in the presence of the court. If no alternate juror is available, the court must declare a mistrial pursuant to subdivision three of section 280.10.

[6] Counsel suggested that the court in *Ryan* said that if the defendant agrees in writing to waive his objection to an alternate juror being seated, he then has a "right" to have this done. We fail to see the language in *Ryan* to which counsel referred. The statute, however, does say "must."

extremely long and they were very odd, in that after Monday, when they said they were hung, and when they really had not done too much deliberations, and I said, really, go back and deliberate. We didn't get a note until this afternoon.

What occurred, I suspect strongly, is that when they sent that note indicating they were hung, eight-four, they thought that was going to be the end of it.

We started getting an addition to the problem with Miss [Doe]'s personal notes with regard to parents and taking care of checks and medicine and so forth.

Miss [Doe] had reached the end of her tether.

I am concerned that if I continue, and I was not going to continue past, at the latest, eleven o'clock tonight, after giving that Allen charge. If we continue, we may have problems with other jurors.

Not Number One and Number Two, I don't know what Miss [Doe]'s position was. I don't know what the position will be of any alternate who would be substituted at this late stage of the proceedings.

I think, quite frankly, I will speak very bluntly, that if I were to substitute an alternate at this stage, it would be absolute [*sic*] absurd, really.

And I am not going to do it.

My main concern right now is this:

I have spoken to Miss [Doe]'s husband. I don't want the press to get the name of Miss [Doe].

Now, if I substitute an alternate, I would have to release Miss [Doe]. This is just an ancillary reason for my not going along.

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Now, if I substitute an alternate, I would have to release Miss [Doe]. This is just an ancillary reason for my not going along.

Further, it would be out very quickly that Miss [Doe] suffered this episode.

All right, but it would happen.

There is no way I can guard against it.

If I substitute an alternate right now, Miss [Doe]'s name would be in the paper tomorrow.

Now, what I'm going to do is I'm going to very briefly go outside here and I am going to discharge the jury. I am going to direct that they not speak to to press when they're gone.

I'm going to now direct my words to the press, to the audience.

I'm going to tell the press the reason why I am directing the jury not to speak to the press, is that one of the jurors has had—I don't want to say a breakdown or something, but she is on the verge, she is within moments of it.

But I don't want to say that because I don't want people calling and trying to find out who the problem is with.

The next thing is, Miss [Doe], and I spoke to her husband, and he doesn't want this to happen. Nobody in his right mind would want this to happen.

Miss [Doe] will have irreparable damage to her mental health, and that's my main concern right now. That's my main concern.

Not my only concern. I have a hundred concerns. That's my main concern, my overriding concern.

After more colloquy, the court added:

As I say, I was within a couple of hours of discharging the jury, in any event. To me, it's utterly

absurd, seriously, to bring in an alternate who's not deliberated during these last six or seven days, whatever it is, and have that person now join in deliberations.

I don't see what purpose would be served.

I am playing Russian roulette with some other people on the jury.

I have tried to make them fairly comfortable. I don't think that their life has been too comfortable, from what I have heard, they are literally, just ready to burst out of here. They have been inside, perhaps, too long.

I am concerned about it. So that's what's going to happen.

Subsequently the following colloquies occurred:

THE COURT: I am talking not only about that statute, but about my discretion to discharge the jury after all of these lengthy deliberations, in view of the incident that has occurred with regard to Miss [Doe] and in view of all the other circumstances that I must consider when I am going to discharge a jury.

I am ruling that it is now time to discharge this jury.

MR. SCOTT-McLAUGHLIN: If I may make a suggestion?

THE COURT: Yes.

MR. SCOTT-McLAUGHLIN: For the sake of the record, one, we at least inquire of the jurors whether or not they feel there is a possibility of a verdict at this point, after the Allen charge.

THE COURT: What about Miss [Doe]?

What am I going to do with Miss [Doe] now in order to save her embarrassment?

. . . .

THE COURT: You mean, I should discharge Miss [Doe], replace her with one of these others?

MR. GOMBINER: You should replace her with one of the alternates, first.

THE COURT: If they can come to a verdict in an hour and a half?

MR. SCOTT-McLAUGHLIN: If they can come to a verdict, if there has been movement.

. . . .

THE COURT: You see, we're dealing with two different concepts.

One is the right of the defendants to agree to have an alternate substitute. The next is my discretionary or my duty to discharge the jury after lengthy deliberations at the proper time, and I feel, especially in light of this development, that this jury has had enough.

DISCUSSION

Appellants argue that the trial court's refusal to implement N.Y. Crim. Proc. Law § 270.35 or to explore other alternatives deprived them of their "valued right," [7] to obtain "the verdict of a tribunal [the defendant] might believe to be favorably disposed to his fate." [8] As Justice Harlan has stated:

[T]he *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defen-

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[7] *See Wade* v. *Hunter*, 336 U.S. 684, 689 (1949).

[8] *See United States* v. *Jorn*, 400 U.S. 470, 486 (1971).

dant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. See *United States* v. *Perez*, 9 Wheat., at 580.

The conscious refusal of this Court to channel the exercise of that discretion according to rules based on categories of circumstances, see *Wade* v. *Hunter*, 336 U.S., at 691, reflects the elusive nature of the problem presented by judicial action foreclosing the defendant from going to his jury. But that discretion must still be exercised . . . .[9]

Appellants argue that the trial court's declaration of mistrial was in derogation of constitutionally and statutorily mandated procedures. They argue that the trial judge first impermissibly refused to comply with the defendants' express request to implement § 270.35; then stated an impermissible reason for ordering a mistrial (the desire to spare Ms. Doe attention from the press); and finally, only to save his original order, stated post hoc his belief that the jury (which he knew harbored one mentally ill member) would not have been able to reach a verdict.

We turn first to the statutory contention. Federal habeas corpus is not, of course, available simply by virtue of a violation of state criminal law. *Rogers* v. *Peck*, 199 U.S. 425 (1905); *Chance* v. *Garrison*, 537 F.2d 1212 (4th Cir. 1976). We take it, therefore, that appellants' statutory argument is an aspect of its constitutional argument that the trial court violated the double jeopardy clause in ordering the mistrial, because a "manifest neces-

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[9] *Id.* at 485.

sity" to declare a mistrial could not exist where the trial court failed to implement a statute *requiring* the substitution of an alternate juror in these circumstances. Although the State does not advance the point, we believe that the trial court properly determined that N.Y. Crim. Proc. Law § 270.35 was not intended to limit a trial court's discretion to declare a mistrial under N.Y. Crim. Proc. Law § 280.10 [10] and § 310.60.[11] Indeed, in a memorandum

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[10] § 280.10 Motion for mistrial

At any time during the trial, the court must declare a mistrial and order a new trial of the indictment under the following circumstances:

1. Upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives him of a fair trial. When such an error, defect or conduct occurs during a joint trial of two or more defendants and a mistrial motion is made by one or more but not by all, the court must declare a mistrial only as to the defendant or defendants making or joining in the motion, and the trial of the other defendant or defendants must proceed;

2. Upon motion of the people, when there occurs during the trial, either inside or outside the courtroom, gross misconduct by the defendant or some person acting on his behalf, or by a juror, resulting in substantial and irreparable prejudice to the people's case. When such misconduct occurs during a joint trial of two or more defendants, and when the court is satisfied that it did not result in substantial prejudice to the people's case as against a particular defendant and that such defendant was in no way responsible for the misconduct, it may not declare a mistrial with respect to such defendant but must proceed with the trial as to him;

3. Upon motion of either party or upon the court's own motion, when it is physically impossible to proceed with the trial in conformity with law.

[11] N.Y. Crim. Proc. Law § 310.60 provides in part:

1. A deliberating jury may be discharged by the court without having rendered a verdict only when:

(a) The jury has deliberated for an extensive period of time without agreeing upon a verdict with respect to any of

[Footnote continued on following page]

opinion denying appellants' Article 78 petition to dismiss the indictment the Appellate Division said:

> Notwithstanding the fact that the trial court had delivered an *Allen* charge (*Allen* v. *United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528) three hours prior to its declaration of a mistrial, it was not bound to substitute an avaliable alternate, pursuant to CPL 270.35, when one juror was unable to continue deliberations. Because the jury had been deliberating for seven days and had twice declared itself deadlocked (first on the fourth day of deliberations and again on the seventh day of deliberations), the court could have concluded that agreement on a verdict was unlikely within a reasonable time and thus properly declared a mistrial in accordance with CPL 310.60. The Trial Judge was "best situated intelligently to make such a decision" (*Gori* v. *United States*, 367 U.S. 364, 368, 81 S. Ct. 1523, 1526, 6 L. Ed. 2d 901) and, under all the relevant facts and circumstances, we find that he exercised his discretion properly and that retrial will not deprive petitioners of any constitutional right [citations omitted].

Hameed v. *Rotker*, 99 A.D.2d 824, 824, 472 N.Y.S.2d 417, 417 (1984), *leave to appeal denied* Mar. 29, 1984. Although petitioners suggest otherwise, the Appellate Division's finding that the trial court had properly exercised its discretion was not fashioned out of whole cloth. One need only refer to the statements made by the trial judge particularly toward the end of the colloquies, quoted above.

[Footnote continued from previous page]

> the charges submitted and the court is satisfied that any such agreement is unlikely within a reasonable time; or
>
> (b) The court, the defendant and the people all consent to such discharge; or
>
> (c) A mistrial is declared pursuant to section 280.10.

which occurred at around 9:30 p.m. on the evening of October 6. These statements reflect a trial judge acting with prudence in the exercise of his "discretion to discharge the jury after all of these lengthy deliberations, in view of the incident that has occurred with regard to Miss [Doe] *and in view of all the other circumstances that I must consider when I am going to discharge a jury*" (emphasis added).

Having determined that under the circumstances of this case, N.Y. Crim. Proc. Law § 270.35 did not require the trial court to substitute an alternate juror when Ms. Doe became indisposed, we may now squarely address the constitutional issue before us—did the trial court have constitutionally sufficient grounds for having declared appellants' trial a mistrial?

As an initial matter, we must bear in mind the injunction of *Arizona* v. *Washington*, 434 U.S. 497 (1978), that a trial judge's determination or perceptions must be given "great deference," *id.* at 510, and that "necessity" is not to be taken literally, *id.* at 511 ("In a strict, literal sense, the mistrial was not 'necessary.' "). Our duty is to be sure that the trial judge exercised " 'sound discretion' in declaring a mistrial." *Id.* at 514; *accord United States* v. *Grasso*, 600 F.2d 342, 344 & n.6 (2d Cir. 1979).

We believe the exercise of the judge's discretion was "sound" under all the circumstances, which include the increasingly apparent strain and tension placed on the sequestered jury by the lengthy deliberations, the highly charged atmosphere of the case,[12] and the remote likeli-

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[12] The inflammatory nature of this case is perhaps best reflected in appellants' description of the proceedings we now review as "the second trial of two Black radicals charged with the assassination of a white police officer. The racial, political and emotional tensions surrounding such a trial are without parallel."

hood that even a jury untroubled by Ms. Doe's illness would have reached a verdict by the end of the evening. Accordingly, we do not find improper the trial judge's determination that putting an alternate on the jury at this late stage would have been "absurd." Indeed, it is the "national consensus of bench and bar" that the substitution of alternates after deliberations have commenced should not be permitted, *United States* v. *Viserto*, 596 F.2d 531, 540 (2d Cir. 1979); and the Federal Rules implement that consensus, Fed. R. Crim. P. 24(c); *see* Orfeld, *Trial Jurors in Federal Criminal Cases*, 29 F.R.D. 43, 46 (1962). This is because an alternate juror who enters the jury room after deliberations have begun has missed the discussion and consideration that have previously taken place which make up the deliberative process. *See People* v. *Ryan*, *supra*.

It is true that the trial judge said that Ms. Doe's mental health was his "main concern," and that he declined to inquire of the other jurors whether or not they felt there was a possibility of a verdict apparently out of concern for embarrassment to Ms. Doe. We view those words in context, however. The judge was rightly sensitive about embarrassing a person (or her family) who was in the middle or on the verge of a psychiatric episode.[13] He was careful, however, to state his view that other considerations compelled the declaration of a mistrial; he cannot be held to a punctilious choice of language while simultaneously dealing with the problem of whether

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[13] *Cf. People* v. *Prisco*, 37 A.D. 2d 369, 326 N.Y.S. 2d 65 (1971), *aff'd*, 30 N.Y. 2d 808, 334 N.Y.S. 2d 905, 286 N.E. 2d 279, *cert. denied*, 409 U.S. 1039 (1972) (where juror becomes ill after jury deliberations commence, court's first duty is to secure medical assistance notwithstanding statutory provision prohibiting jurors from speaking with non-jurors).

to declare a mistrial and the mechanics of handling a juror's having a psychiatric breakdown, surely a trying experience for one and all.

Of course, appellants rightfully call our attention to the fact that a trial judge's discretion to declare a mistrial is far from boundless, *cf. Dunkerley* v. *Hogan*, 579 F.2d 141, 148 (2d Cir. 1978) (mistrial wrongly declared where seven- to ten-day continuance could have been granted to avoid declaring mistrial after defendant became ill); *United States* v. *Starling*, 571 F.2d 934 (5th Cir. 1978) (mistrial wrongly declared where information of possible juror bias discovered—no irreconcilable conflict expressly professed by jury, and trial judge fails to query jury on possibility of reaching verdict); and that a declaration of mistrial stemming solely from a concern for the interests of a juror might exceed these bounds. We do not think, however, that a review of the record on the whole should be discarded in favor of fixing only upon the point in time where the trial judge seemingly first declared a mistrial because of his concern about Ms. Doe. Rather, we are entitled to the benefit of his subsequent elucidating comments, because while the trial judge permitted the lawyers to argue their points he was in effect reserving the right to change his mind. This happens every day in the courtroom or in chambers colloquy.

Appellants also object to the court's failure to inquire of the other jurors concerning whether they felt a verdict was obtainable. While making such an inquiry surely would have been the better practice, the jury had already sent in two notes indicating that they could not agree and had received an *Allen* charge and conducted two hours or so of post-*Allen* deliberations. Justice O'Brien had previously stated his belief that the evening of

October 6, 1983, was to be the last of the trial. When, during that evening, Justice O'Brien confronted Ms. Doe's psychiatric problem and with it his option to substitute an alternate at the eleventh hour of deliberations, we think that he acted soundly in throwing in the judicial towel. In short, he was acting not by inclination but with judgment, *see United States* v. *Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d); and so long as that judgment is guided by appropriate legal premises and is factually well informed, it may rightly be called a sound exercise of discretion *See* Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 784 (1982).

Judgment affirmed.

LUMBARD, *Circuit Judge*, concurring:

Justice O'Brien of the New York Supreme Court granted a mistrial at the second trial of Basheer Hameed and Abdul Majid, two black Muslims, for the murder of a white police officer in Queens County on April 16, 1981. The defendants were originally tried, in August 1982, on an indictment charging them with murdering one police officer and attempting to murder another. The jury convicted the defendants of attempted murder but they failed to agree on the murder charge.

At the second trial, held in the summer of 1983, the jury had already deliberated for seven days and had twice reported their inability to reach a verdict when Justice O'Brien declared the mistrial. Also on the seventh day of deliberations, one of the jurors was found to be suffering emotional problems. Justice O'Brien declined to replace the troubled juror with one of the alternate

jurors who was still available, as he might have done under New York Crim. Prac. Law § 270.35. Instead, believing that the jury would remain deadlocked regardless of a substitution, he ordered a mistrial.

In an attempt to avoid a third trial on the murder charge, Hameed and Majid then sought the aid of the Eastern District Court by petitioning for habeas corpus, claiming that the state court's grant of a mistrial violated the constitutional prohibition against double jeopardy. Judge Platt denied the petition because he found that the declaration of a mistrial was a proper exercise of discretion. I agree.

There was every good reason to grant a mistrial on the seventh day of disagreement. The fact that one of the jurors was in a highly emotional state simply underscored the fact that their further consideration of the case would have been futile; it was an additional reason to declare a mistrial.

Consequently, I see no reason for this court to consider whether an alternate juror should or might have been substituted pursuant to New York law. I see much less reason for any of us to state his own ideas on what is thought to be the "national consensus of bench and bar" about the use of alternate jurors after the jury has commenced deliberating. In this day, with longer and more expensive trials in multi-defendant cases, fair expedients to avoid the necessity of retrying such cases should be used. I think there is much to be said for the use of alternate jurors at any time they may be needed prior to agreement upon a verdict.

EDNY
Platt
84-CV-1329

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 7th day of February, one thousand nine hundred and eighty-five.

BASHEER HAMEED (f/k/a James Dixon York) and ABDUL MAJID (f/k/a Anthony LaBorde),

Appellants,

v.

Docket No. 84-2150

W. CLINTON JONES, Superintendent of Great Meadows Correctional Facility, and EUGENE LEFEVRE, Superintendent of Clinton Correctional Facility,

Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants-Basheer Hameed and Abdul Majid.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk
by Francis X. Gendhart
Chief Deputy Clerk